NO. 77-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

EASTEX, INCORPORATED,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

Of Counsel:

BAKER & BOTTS
One Shell Plaza
Houston, Texas 77002

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TOM MARTIN DAVIS
JOHN B. ABERCROMBIE
LAWRENCE J. MCNAMARA
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234
Attorneys for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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1. "Pet. App. . . ." means page . . . of the Appendix contained in the Petition for a Writ of Certiorari.
2. "App. . . ." means page . . . of the Appendix designated by the parties.
3. "R. . . ." means page . . . of the record of the hearing before the Administrative Law Judge.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Administrative Law Judge of the National Labor Relations Board is reported at 215 NLRB 271 (Pet.App. 4a-23a). The decision and order of the National Labor Relations Board is reported at 215 NLRB 271 (Pet.App. 24a-25a). The opinion of the Fifth Circuit Court of Appeals is reported at 550 F.2d

198 (Pet.App. 26a-42a). The judgment of the Court of Appeals appears in the Petition Appendix at 43a. The decision of the Fifth Circuit denying Petitioner's motion for rehearing and motion for rehearing *en banc* is reported at 556 F.2d 1280 (Pet.App. 44a-47a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1977 (Pet.App. 43a). A timely petition for rehearing was denied on August 5, 1977 (Pet.App. 47a). Mandate was stayed to and including September 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f).

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, reads in pertinent part as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) reads as follows:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in § 157 of this title.

QUESTIONS PRESENTED

1. Whether the "mutual aid or protection" language of Section 7 of the National Labor Relations Act grants protection to distribution, by employees on their employer's property, of writings or other materials containing subject matter which is political in nature or is not closely related to the employees' immediate employment relationship?

2. Whether Section 7 grants protection to the distribution by employees on an employer's premises of any material having a subject matter "reasonably related" to the employees' jobs, status, or conditions as employees?

3. Whether the interference with an employer's property rights which results from application of the "reasonable relation" standard used by the court below is completely out of proportion to the nature and strength of the Section 7 rights to be protected?

4. Whether the "accommodation" and "balance" made by the Court of Appeals in applying its "reasonable relation" standard reflects an appropriate recognition of an employer's property rights?

5. Whether the initial "balancing and accommodation" of employees' Section 7 rights and employer private property rights should have been made by the National Labor Relations Board rather than by the Court of Appeals?

STATEMENT OF THE CASE

This is an action to review a final order of the National Labor Relations Board ("Board") wherein the Board determined that Eastex, Incorporated ("Eastex")

violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) ("Act"), in prohibiting distribution by employees of a Union-sponsored circular on Eastex' premises.

This case arose out of a decision by the Personnel Director of Eastex denying permission to employee members of the United Paperworkers International Union, Local 801 ("Union"), to distribute a union circular on Eastex' plant premises because Sections 2 and 3 of the circular were considered to have no relevance to any matter concerning Eastex' relations with its employees, and were political in nature. Eastex had no objection to the distribution on plant premises of Sections 1 and 4 of the circular (The complete contents of the circular appear in the Appendix at pages 2-4). Section 2 of the circular, "A Phoney Label—right to work", consisted of an argument against inclusion by a Texas constitutional convention of a "right to work" provision in a proposed revised constitution.[1] Section 3 of the circular, "Politics and Inflation", contained criticism of then President Nixon for his veto of H.R. 7935, a minimum wage bill, and comments about oil industry profits.

As a result of Eastex' refusal to allow distribution of Sections 2 and 3, Union filed an unfair labor practice charge with the Board on May 2, 1974, alleging violation of the Act. An amended charge was filed on June 4, 1974. The Board issued a complaint on June 4, 1974, alleging violations of Section 8(a)(1) of the Act through Eastex' refusal to allow distribution of the circular and its retention of no-solicitation and no-posting rules.

1. Texas has been a "right to work" state continuously since 1947. See Tex. Rev. Civ. Stat. Ann. Art. 5154g, § 1.

An Administrative Law Judge held that prohibiting distribution of the entire circular on plant premises was a violation of Section 8(a)(1) of the Act (Pet.App. 4a-23a).[2] On December 4, 1974, a three-member panel of the Board rendered a decision and order affirming the rulings, findings and conclusions of the Administrative Law Judge, and adopted his recommended order (Pet. App. 24a-25a).

On Appeal under Section 10(f) of the Act, the court below affirmed.[3] The court held that the "mutual aid or protection" clause of Section 7 extends to cover distribution on plant premises of "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant", and included Sections 2 and 3 of the Union circular within the compass of such protection. The court rejected Circuit authority from the Fourth, Sixth, Seventh and Ninth Circuits which more narrowly limits the scope of Section 7 protection. On petition for rehearing and petition for rehearing *en banc*, the court below deleted all references to the First Amendment which were contained in its original opinion. Rehearing was denied (Pet.App. 44a-47a).

SUMMARY OF ARGUMENT

The protection offered by the "other mutual aid or protection" clause of Section 7 of the National Labor

2. The Administrative Law Judge also found that Eastex maintained a no-solicitation rule in violation of § 8(a)(1) of the Act. Eastex does not challenge the Administrative Law Judge's order as to the rule, nor did this rule play any role in Eastex' decision to prohibit distribution of the union circular. The rule is not in issue here. A no-posting rule was upheld. If distribution of the circular was not protected, the presence or absence of a no-solicitation rule would have no effect.

3. Reported at 550 F.2d 198 (5th Cir. 1977) (Pet. App. 26a-42a).

Relations Act does not extend to activity engaged in on the employer's property which has, at best, only an indirect bearing on the relationship between the employer and his employees. Section 7 does not protect political or non-employment related activities of employees on their employer's private property.

Activity protected under the "other mutual aid or protection" clause of Section 7 should contain the following elements: (1) a specific dispute; (2) with the employer; (3) over an issue which the employer has the right or power to affect. The activity deemed "protected" by the National Labor Relations Board and the court below possessed none of these elements.

The court below adopted a Section 7 standard which would protect any activity "reasonably related to the employees *jobs*, or to their status or condition as employees". However, the "reasonable relation" standard, as adopted and applied by that court, is impermissibly broad and, in effect, meaningless. Legislative history indicates that the Act was designed to regulate only the relationship between an employer and its employees. Consequently, activity not having a significant or direct bearing to the employer-employee relationship is unprotected by Section 7 of the Act, and the employer may lawfully prohibit it on his private property.

Even if an activity is within the protected scope of Section 7, the nature and need for that activity must be balanced against the employer's private property rights, and an accommodation made, "with as little destruction of one as is consistent with the maintenance of the other." *Central Hardware Co. v. NLRB*, 407 U.S. 539; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105. The

activity the Union sought to engage in here, the in-plant distribution of literature dealing with general economic and political matters, was not of such a nature or the result of such a need as to outweigh Eastex' property rights. *Hudgens v. NLRB*, 424 U.S. 507. This conclusion is reinforced by the reasonable alternative means of communication available to the Union for distribution off of Eastex' private property. *NLRB v. United Steelworkers*, 357 U.S. 357.

Finally, the court below erroneously undertook the initial balancing and accommodation process, a task which was required of, but omitted by, the Board. *Hudgens v. NLRB, supra.*

I. THE SCOPE OF SECTION 7 EXTENDS PROTECTION ONLY TO CONCERTED ACTIVITY WHICH IS CONNECTED TO THE EMPLOYEES' RELATIONSHIP TO THEIR IMMEDIATE EMPLOYER

A. The Activity Must Have A Significant Connection To The Relationship Between Employer and Employee In Order To Be Protected.

It is well settled that not all concerted activity is protected under Section 7. *NLRB v. Local 1229, IBEW*, 346 U.S. 464. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240. But there is a sharp conflict among (and within) the Circuits as to the scope of activity protected by the "other mutual aid or protection" clause of Section 7.

A number of Circuit Courts of Appeals have attempted to define the outer parameters of the "other mutual aid or protection" clause of Section 7 of the National Labor Relations Act. The majority of the Circuit Courts have taken the same position as Eastex: activity is protected within the "other mutual aid or protection" clause only if it concerns matters significantly connected to the employees' employment relationship with their employer.[4] Other courts have given wider scope to the clause.[5] The Fifth Circuit held below that any matter "reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject" of handouts distributed on the plant premises. 550 F.2d 198, 202 (Pet. App. 36a).

The facts of this case lend a starting point for an analysis of the issue. The Union here sought to distribute a "news bulletin" which contained four sections: (1)

4. See *NLRB v. Leslie Metal Arts Co., Inc.*, 509 F.2d 811, 813 (6th Cir. 1975), ("Protected activity must in some fashion involve employees' relations with their employer. * * *"); *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), (Protected activity must seek a specific remedy for a work-related complaint or grievance); *NLRB v. Tanner Motor Livery Ltd.*, 419 F.2d 216 (9th Cir. 1969), (the mutual aid clause of Section 7 "protects concerted activities which have to do with terms and conditions of employment"); *G & W Electric Speciality Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966), (when the activity of the employee does not involve a request for any action on the part of the company or does not concern a matter over which the company has any control such action is not within the other mutual aid or protection of 29 U.S.C.A. § 157); *NLRB v. Bretz Fuel Co.*, 210 F.2d 392, 396 (4th Cir. 1954), ("Concerted activity is protected only where such activity is intimately connected with the employees' immediate employment").

5. *See NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2nd Cir. 1942); *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930 (1st Cir. 1940), cert. denied, 312 U.S. 710; *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976).

"We Need You"; (2) "A Phony Label—'right to work' "; (3) "Politics and Inflation"; and (4) "Food for Thought". Eastex had no objection to the distribution of Sections 1 and 4. However, Sections 2 and 3 were objectionable to Eastex, and distribution of the handout on its plant premises was not allowed.

Sections 2 and 3 were considered to have no relevance to any matter concerning Eastex' relations with its employees, but were correctly perceived as being political in nature. The Union had always previously used the mails for distribution of its political propaganda.

Section 2 of the handout (Pet. App. 1a-2a) requested the reader to write his state legislators opposing adoption of the existing Texas state "right to work" law into a proposed state constitution. The Texas Legislature at that time had designated itself as a constitutional convention.

Part of Section 3 of the handout, "Politics and Inflation" (Pet. App. 2a-3a), consisted of a broadside against then President Nixon's veto of a minimum wage bill. At that time the minimum wage was $1.60; the lowest hourly wage at Eastex was $3.68 (Pet. App. 15a, n. 10). Approximately one-half of Section 3 concerned the Union president's opinion on oil industry profits. Finally, the reader was asked to register to vote.

Sections 2 and 3 of the Union handout did not concern any issue affecting the employees of Eastex in their relationship with Eastex. Instead, the disputed sections sought to inform the reader about the author's view on matters of general public economic and political interest. Section 7 does not embrace or protect such activity.

Section 7 specifically protects both the right to bargain collectively and the right to engage in other concerted activities for "mutual aid or protection". But this language does not mean that employees have a license to do whatever they please so long as the activity is nominally concerted and is not unlawful. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332. An activity, to be protected, must have as its purpose alteration of or effect on some aspect of the employment relationship. It is only in their role as "employees" that employees are present on the employer's premises, and it is only when acting in scope of that role that the Act affords them protection.

The extent of this protection was examined by the Fourth Circuit in *NLRB v. Bretz Fuel Co.*, 210 F.2d 392 (4th Cir. 1954), a case analogous to that at bar. In *Bretz Fuel*, the West Virginia Legislature was considering a "Fire Boss" bill which would allow mine foremen to inspect the mines for safety conditions before the start of each shift. This "Fire Boss" bill was "a legislative proposal affecting mine conditions". 210 F.2d at 393. The mine employees struck in opposition to the passage of the bill, and the court held their action to be unprotected activity. The rationale employed by the court is instructive. The court noted that the activity did not "have anything to do with either working conditions or relations between respondent and its employees." 210 F.2d at 397. The court also observed:

> But we think it equally clear that if these same employees had gone on strike to put pressure on Congress to pass a favorable change in the Fair Labor Standards Act, that would be political activity and not protected by the Act, which was designed to protect employees' rights more intimately connected with their immediate employment. We know of no case holding that a wildcat strike designed to put pressure upon the legislature, to pass legislation desired by the Union, is protected by the Act. 210 F.2d at 397.

In *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), the Ninth Circuit adopted a four point test for determining protected activity under Section 7:

1) there must be a work-related complaint or grievance;
2) the concerted activity must further some group interest;
3) a specific remedy or result must be sought through such activity;
4) the activity should not be unlawful or otherwise improper. 497 F.2d at 1202-3.

The broadside at issue in the instant case wholly fails to satisfy the first or third elements of this test.

The Sixth Circuit adopted a similar rule in *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975). That court held that protected activity must in some fashion involve the employees' relations with their employer, and thus constitute a manifestation of a "labor dispute". Section 2(9) of the Act defines "labor dispute" as " . . . any controversy concerning terms, tenure or conditions of employment."

The Seventh Circuit has expressly rejected the position of the Board and that of the court below. In *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966), the court used a "significant connection to

the employment relation" test. In *G & W Electric* the employees had formed a credit union. The employer was not involved in the inception or administration of the credit union. An employee was discharged for passing around a petition addressed to the administrators of the credit union. The Board ordered the employee reinstated. The court refused to enforce the order, stating:

> The Board's decision expresses the view that the ambit of Section 7 is not confined to "activities which are immediately related to the employment relationship or working conditions, but extends to the type of indirectly-related activity" here involved and that the benefits available through membership in an employee credit union "are close enough in kind and character, and bear such a reasonable connection to matters affecting the interests of employees *qua* employees, as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect" . . .
>
> . . . Here the activity involved no request for any action upon the part of the Company and did not concern a matter over which the Company had control. It is true that the employee-members of the credit union had a legitimate concern in the proper administration of its affairs. But their interest, although mutual, was one arising from their status as borrowers or depositor-investors. It was not an interest derived from their status as Company employees or bearing any significant connection to their employment relationship with the Company . . .
>
> . . . The sweep of the broad interpretation inherent in the Board's application of the "or other mutual aid or protection" clause to the facts of the instant case gives to that clause a meaning and effect which in our opinion is out of harmony with the immediate context in which the clause appears and which transcends the subject matter the Act is designed to embrace—labor-management relations.
>
> The range of possible employee mutual interests apart from those which bear a reasonably significant impact upon working conditions or some material incident of the employment relationship is in our opinion a much broader field than Section 7 is designed to encompass.
>
> 360 F.2d at 876-77.

Each of these opinions places emphasis upon one decisive factor: the employee is only protected for activity within the scope of the employment relationship. Once the employee seeks to impose upon the employer as to matters which do not concern the employment relationship, Section 7 becomes inapplicable.

The National Labor Relations Act was enacted to regulate labor-management relations in order to promote industrial peace. Section 7 of the Act was designed to ensure employees' rights within the sphere of the employer-employee relation. Cf. *United Mine Workers of America v. Pennington*, 381 U.S. 657, 666.

The principle which emerges from the above-mentioned cases is that in order to be protected under the "other mutual aid or protection" clause, an activity should contain the following elements: (1) the existence of a specific dispute; (2) with the employer; (3) over an issue which the employer has the right or power to affect. The activity deemed by the Board and the Fifth Circuit to be "protected" possessed none of these attributes. It was unprotected.

B. The "Reasonable Relation" Standard As Adopted And Applied Below Is Too Broad.

The Fifth Circuit held that any matter "reasonably related to the employees' *jobs* or to their status or condition as employees" is protected by Section 7. 550 F.2d 198, 202 (Pet. App. 36a).

The view of the scope of Section 7 inherent in the Fifth Circuit's "reasonable relation" standard was touched upon in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2nd Cir. 1942). In this case some union members met off company premises and produced a resolution of "solidarity" with a farmers "union" engaged in a milk strike. As part of the resolution the employees determined "to register their protest to the management of this company on their action in regards to the 1939 strike of the Dairy Farmers Union . . .", and that a copy of the resolution be sent to the manager of the company. 130 F.2d at 505, n.1. Other copies were sent to the press and published. The court held the discharge of the union president interfered with the employees' Section 7 rights. *Peter Cailler Kohler*, however, is distinguishable. Unlike the instant case, in *Peter Cailler Kohler* there was a specific dispute with management, over action taken by management, and in an area where management had the power and right to act. Additionally, there was no property right involved (See *infra.*).

The Fifth Circuit expressly relied upon *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976). In *Kaiser* the employee-engineers met off the employer's premises and sent a letter to various congressmen objecting to the relaxation of immigration laws as they applied

to foreign engineers. One of the authors was discharged by Kaiser. The Ninth Circuit, in a split decision, held that concerted activity of lobbying legislators regarding policies which would affect their job security is within the protection of Section 7.[6] Kaiser is distinguishable in that the employees (a) met off the plant premises; (b) did not seek to distribute their material on plant property, and (c) sought a specific result on an issue of threatened job security. Circuit Judge Kennedy, in a strong dissent, expressed complete disagreement with the majority holding, citing *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200, 1202-3 (9th Cir. 1976), and *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873, 876 (7th Cir. 1966).

Eastex submits that the "reasonable relation" standard is overly broad and meaningless. This view is underlined by the position taken by the Board in its Brief In Opposition to Eastex' Petition for A Writ of Certiorari. In discussing *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975), the Board stated:

> Moreover, the court's general statement that "[W]hen employee activity is directed at circumstances other than conditions of employment, it is outside the protection of Section 7" (509 F.2d at 813) is not significantly different from the standard adopted by the Court below. (*Bd.* at 9, n.7)

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6. Although the court below relied upon *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976), *Kaiser* is itself in conflict with two other Ninth Circuit decisions: *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), and *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969). *Kaiser* was a 2-1 decision authored by District Court Judge Sweigert which did not overrule such other decisions, and did not involve employer property rights. See 538 F.2d 1379, 1386-87 (Dissent of Kennedy, J.). We submit that the court in *Kaiser* was impliedly extending First Amendment protections to the discharged employee.

Eastex submits that there is a substantial difference between the "reasonable relation" standard as adopted and applied by the Fifth Circuit, and the standard adopted by the court in *Leslie*. In *Leslie* the Sixth Circuit held that "protected activity must in some fashion involve employees' relations with their employer and thus constitute a manifestation of a 'labor dispute' . . ." 509 F.2d at 813. *Leslie* also quoted with approval the "significant impact" standard of *G & W Electric, supra,* which expressly rejected the "reasonable relation" standard, and the Ninth Circuit's holding in *Shelly & Anderson, supra,* that there must be a work-related complaint or grievance. 509 F.2d at 813.

The application of the "reasonable relation standard" in the instant case also reinforces Eastex' assertion as to its excessive breadth and impracticability. None of the topics addressed in Sections 2 and 3 of the handouts concerned Eastex' relations with its employees. As admitted by the court below, only through a long series of indirect and unrelated political and economic events and circumstances could Eastex' relations with its employees be affected in any way by the issues addressed in Sections 2 and 3. In short, Eastex, and its "employees", were uninvolved.

In his posture as an Eastex employee, a reader of the handout had no involvement or relation to the issues addressed in Sections 2 and 3. As a citizen or consumer, each of the topics might be of importance. But the National Labor Relations Act was intended only to regulate the employment relationship. At the moment an employee sheds his status as an Eastex employee, and dons another mantle, that of citizen or consumer, the Act, and Section 7 in particular, becomes inapplicable.

The interpretation of Section 7 by the court below is so broad that any topic in union literature can be easily rationalized into a finding of "reasonable relation" to union or "generic" employee interests. Once this "reasonable relation" is found, the literature may be distributed on an employer's property although its relation to the employer is at best attenuated and, in fact, logically remote. The topics which could be addressed in handouts distributed under the "reasonable relation" standard are almost unlimited.

Controversies in the political sphere over such issues as common-situs picketing, the Equal Rights Amendment, illegal aliens, or welfare reform could all be addressed by union in-plant handouts under the holding of the Fifth Circuit. As examples, the Humphrey-Hawkins bill, if enacted, might well have the same general effect upon national employment as the Fifth Circuit ascribed to the minimum wage bill (550 F.2d at 205 [Pet. App. 41a]); and amendment of the National Labor Relations Act could more directly affect union strength than the proposed Texas "right to work" constitutional provision. Consequently, under the "reasonable relation" rule, an employer would interfere with his employees' Section 7 rights if he prohibited employees from distributing, on plant premises, broadsides supporting their positions on such bills.

Those seeking public elective office may well pursue actions or philosophies which have a reasonable relation" to the employees' "status or condition". Accordingly, the ruling of the Fifth Circuit would appear to allow distribution under Section 7 of literature endorsing such candidates. For example, during the 1976 Presidential

election campaign, President Carter endorsed the Humphrey-Hawkins bill, while then President Ford opposed it. Since the bill would seemingly have a "reasonable relation", an employee conceivably would have been permitted to distribute, on an employer's private property, literature which endorsed Mr. Carter and cited his stand on Humphrey-Hawkins.

Eastex submits that in practice the "reasonable relation" rule, as interpreted and applied below, is meaningless, and will allow distribution of material having no real bearing on the employer-employee relationship.

The term "employee" as defined in Section 2(3) of the Act should not be stretched beyond its plain meaning to encompass the generic, but should be limited, as Congress intended to limit it, to one who works for a specific employer for hire. See H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947).

In the past the Board itself has had occasion to affirm that, in order to be protected, the concerted activity involved should relate to "organizational matters" or be "germane to the employment relationship" between employees and their employer. *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1511-12, *aff'd sub nom. NLRB v. Local Union 1229, IBEW*, 346 U.S. 464. As was noted by this Court in that case:

> The handbills made no reference to the union, to a labor controversy, or to collective bargaining. . .
>
> Their attack related itself to no labor practice of the Company. It made no reference to wages, hours or working conditions. . . 346 U.S. at 468, 476.

The Act was construed in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, as being designed only to regulate and protect the employee-employer relationship. Once that bond is legally broken, or where the subject does not significantly affect the employee-employer relationship, or the significant interests of the employees as employees of the employer, the Act is no longer applicable.

It is the Board's duty and function to regulate the employer-employee relationship. Where a union, or employees, seek to expand their interests beyond that employer-employee relationship into the sphere of the general "public weal", or into areas of social or political comment apart from any significant facet of the employment relationship, the protections granted in Section 7 do not attach. Cf. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 13. This is especially true when the activity is engaged in on the employer's property.

C. The Legislative History Of The Wagner Act Further Demonstrates That The Act Is Intended Only To Regulate Matters Within The Employment Relationship.

A review of the legislative history of the Wagner Act indicates clearly that Congress intended to regulate only the relationship between the employer and employee.

The opposition to the Wagner Act, which was at times almost hysterical, never focused upon the scope of protected concerted activity as it bears upon the employment relationship. On the contrary, it was assumed by all that the Act dealt with no more than the regulation of matters closely incident to the relationship between employer and employee.

As this Court has held repeatedly, "it is the sponsors that we look to when the meaning of statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95. A review of the statements made by the sponsors of the Wagner Act, especially those of Senators Wagner and Walsh, illuminates Congress' intent.

Senator Walsh was the chairman of the Senate Committee on Education and Labor, and he also served on the conference committee charged with reconciling the House and Senate versions of the bill, S. 1958. During debate on a proposed amendment to Section 7 by Senator Tydings, Senator Walsh explained the purpose of the bill:

> Mr. Walsh. . . . It makes absolutely no change whatever in the existing law, so far as the relation of employers and employees are concerned, excepting those limited respects that relate to collective bargaining and the right of employees to organize without interference by employers.
>
> . . . What does the pending bill do? It does two things: It seeks to make effective the right of the employee to organize and engage in collective bargaining . . . 79 Cong. Rec. 7658.
>
> The bill does provide the means and manner in which employees may approach their employers to discuss grievances and permit the Board to ascertain and certify the persons or organization favored by a majority of the employees to represent them in collective bargaining, when the question of that representation is in doubt or dispute. Beyond this the bill does not go.
>
> A crude illustration is this: The bill indicates the method and manner in which employees may organize, the method and manner of selecting their

> representatives or spokesmen, and leads them to the office door of their employer with legal authority to negotiate for their fellow employees. The bill does not go beyond the office door . . . 79 Cong. Rec. 7659.
>
> . . . There is practically no change whatever in the present conditions affecting employers and employees except to provide for the creation of the machinery without interference by employers to permit employees to choose representatives to go to their employers for the purpose of collective bargaining. 79 Cong. Rec. 7660.

In the same vein, the author of the bill, Senator Wagner, stated that:

> The whole philosophy of this legislation is to deal with the relationship between employees and employers. 79 Cong. Rec. 7670.

The statements made by other leading proponents of the bill during debate also make clear that the protective umbrella of Section 7 relates only to activities which concern the collective bargaining relationship between employer and employee. For instance, Senator Borah, a member of the conference committee, argued that:

> We are here dealing with the relation between employer and employee. . . . 79 Cong. Rec. 7650.
>
> Section 7 of bill deals only with collective bargaining. 79 Cong. Rec. 7656.

Other aspects of the legislative history of the Wagner Act lend further support to Eastex' view of the Act. Senate Report 573, 74th Cong., 1st Sess., 1935, by the Committee on Education and Labor, included the following statements in its analysis of the bill.

> Section 7 and 8. Rights of employees—Unfair labor practices. These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining . . . Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices in their judgment are deemed to be unfair. (p. 9)

In discussing constitutionality, the Committee referred again to the "employer-employee" relationship.

> The Committee is convinced that this proposal keeps within the confines of the constitutional power of Congress. The two main questions involved are: (1) are the regulations of the employer-employee relationship herein contemplated within the boundaries of due process of law . . . *Ibid* p. 17.

The Report of the House Committee on Labor included findings and a declaration of policy which stated the objective of the bill.

> The Committee wishes to emphasize particularly the objective of the bill to remove certain important sources of industrial unrest engendered, first, by denial of the rights of employees to organize and by the refusal of employers to accept the procedure of collective bargaining, and second, by failure to adjust wages, hours, and working conditions traceable to the absence of processes fundamental to the friendly adjustment of such disputes. . . . By protecting the right of employees to organize and bargain collectively, and as a direct result by promoting just and appropriate practices for friendly adjustment, the bill eliminates the most important causes of unrest and strikes. . . . 74 Cong., 1st Sess., H. Rep. No. 1147, p. 18 (1935).

It was not Congress' intention to go beyond the regulation of the employer-employee relationship and the process of collective bargaining. Consequently, an activity, in order to be protected, must concern some aspect of the relationship between an employer and his employees. An activity is not protected if it can be considered to have only a speculative or remote connection to the employment relationship.

An analysis of the language of Section 7, although not clear, points toward the same result.

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other[7] concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The words "or other mutual aid or protection" indicate that activity other than that required for collective bargaining of a contract is protected. But both the word "mutual" and the preceding words "collective bargaining"

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7. The word "other" was added by the Taft-Hartley Act, 61 Stat. 136 (1947). It appears to have been inserted as a compromise. The House version had inserted the phrase "in other concerted activities (not constituting unfair labor practices under Section 8(b), unlawful concerted activities, under Section 12, or violations of collective bargaining agreements,") immediately after "and to engage . . ." The Senate version had retained the original Wagner Act language of the clause. Consequently, no importance should be attached to this first use of the term "other." See, 1 Legislative History of the Labor-Management Relations Act of 1947, pp. 176, 536-37, 543.

refer back to "employees"—employees in the specific sense of one working for an identifiable entity for hire. The phrase "collective bargaining or . . ." indicates a direct bargaining relationship whereas "other mutual aid or protection" must refer to activities of a similar nature —employees acting in concert with, or on behalf of, their fellow employees on employment and matters of mutual concern.

Sections 2 and 3 of the Union handout did not in any way concern Eastex' relationship with its employees. The topics addressed in the handout might possibly be seen to have an indirect relation to employees as "workers of the world", but legislative history indicates that activity with such an attenuated relation to the employer and his employees is not to be protected. As this Court has repeatedly stated, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Boisdoré's Heirs,* 8 How. 113, 122. See also, *NLRB v. Lion Oil Co.,* 352 U.S. 282, 288.

D. Activity On An Employer's Premises Which Is Unrelated To The Employment Relationship Falls Outside Of The Protection Of Section 7.

It is a "commonplace", of course, that the First Amendment does not apply to private property which has not assumed a public character. *Central Hardware Co. v. NLRB,* 407 U.S. 539. Also, it has been held that considerations of speech on an employer's property must be viewed only under Section 7 of the Act rather than under the strictures of the First Amendment. *Hudgens v. NLRB,* 424 U.S. 507.

Consideration of the factual situation in this case in light of the reasoning utilized by this Court in *Lloyd Corp. v. Tanner,* 407 U.S. 551, is useful. In *Lloyd* this Court pointed toward the "unrelated nature" of the handbilling involved to any purpose for which the shopping center was built and being used. 407 U.S. at 564. First Amendment protections did not attach. Dissenting in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza,* 391 U.S. 308, Mr. Justice White also noted the limited scope of that shopping center's invitation to the public. ". . . The public is invited to the premises but only in order to do business with those who maintain establishments there." 391 U.S. at 338.

Just as property does not lose its private character "merely because the public is generally invited to use it for designated purposes," (*Lloyd, supra* at 569) an employer's property does not lose its private character merely because a labor union is involved or certified. Just as the public is invited to a merchant's premises to do business, employees are allowed on an employer's premises to work. Cf. *NLRB v. Sands Mfg. Co.,* 306 U.S. 332. The employer's property is devoted to one purpose—work. The invitation to employees to enter the premises is limited to the accomplishment of that purpose. The relationship is not that of public entity to citizen, but is instead only one of employer to employee. The privileges and protections afforded both parties are limited by their respective roles in the employment relationship.

The direct relation to the purpose or use of the property required in *Lloyd* must also be required in situations involving Section 7 rights. Where an activity has no direct bearing on any aspect of the relationship between the employer and his employees, it is unprotected. Section

7 does not grant a license to employees or a union to use the employer's property as a forum to espouse non-work related views. An employer's property, unlike a public park, is not designed to be a meeting place for various political or social clubs or organizations to proselytize. The private nature of the property, and the purpose for which the property is dedicated prohibit such activity.

Sections 2 and 3 of the Union handout are an attempt by the Union to convert Eastex' property into a general forum for the airing of political, or non-work related views. Its distribution was not protected.[8]

II. EVEN IF AN ACTIVITY IS PROTECTED BY SECTION 7, THE NATURE AND STRENGTH OF THAT ACTIVITY MUST BE BALANCED AGAINST THE EMPLOYER'S PROPERTY RIGHTS AND AN ACCOMMODATION MADE, WITH MINIMAL INTERFERENCE TO SUCH PROPERTY RIGHTS

A. The Property Rights Of The Employer Must Be Considered.

If a determination is made that an activity is protected by Section 7, the focus of inquiry turns to a consideration of the employer's private property rights. Although the Act regulates the relationship between employer and employee, the employer does not relinquish his property rights merely because of such relationship. Instead, the employer's property rights must be considered

8. We submit that the question of accommodation (discussed *infra*) does not arise since as a matter of law the subject of the union handout does not fall within "other mutual aid or protection."

and balanced against the nature and strength of the Section 7 right asserted. *Hudgens v. NLRB,* 424 U.S. 507. But where, as here, the union activity involved is remote from the employer-employee relationship, the result is preordained. The balance must be struck in favor of the employer's property rights.

Naturally, there are conflicts between Section 7 rights and private property rights. It is the Board's duty to "balance the interests asserted and to seek a proper accommodation between the two." *Central Hardware Co. v. NLRB,* 407 U.S. at 543. *Hudgens* instructs that the "guiding principle" (*Central Hardware,* at 544) established by this Court under the Act is the accommodation of Section 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." 424 U.S. at 522. The "locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context." *Hudgens* at 522.

In three decisions this Court has been uniform in its emphasis upon minimal interference with the property rights of employers. *Hudgens, supra; Central Hardware, supra; NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105. The principle of *Babcock* and *Central Hardware* requires a "yielding" of property rights which is *"temporary and minimal"* only after a balancing and accommodation has been made. 407 U.S. at 544. While both *Babcock* and *Central Hardware* involved organizational campaigns, this Court in *Hudgens* held that other union activities (there strike picketing) must also be accommodated to employer property rights in a manner that results in "minimal interference".

B. Eastex' Property Interest Outweighs The Attenuated Nature Of The Union Activity Involved Here.

The next inquiry must be directed toward the nature and strength of the protected activity, in order to balance and then seek an accommodation with private property rights. Interference with private property rights must "be temporary and minimal" so far as is possible.

The court below balanced the respective rights of the employer and employees erroneously. The effect of the "balance" reached by the court below will be to extend Section 7 protection to practically every conceivable subject of union concern, unless it is certain to cause disruption.

The holding of the Fifth Circuit that the subject matter of any distributed materials having a "reasonable relation" to the employees or their status or condition is protected is in error.[9] But, even if it were not, if the subject matter does not involve a request for any action on the part of the employer, or does not concern a matter over which the employer has any degree of control, the accommodation process necessarily requires the conclusion that distribution on the employer's property is unprotected. As was stated in *Hudgens,* supra:

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9. The standard adopted by the Fifth Circuit in the instant case, and the practical effects of the standard, establish and extend First Amendment parameters to Section 7. The original decision of the Fifth Circuit reflected this predisposition. On Eastex' motion for rehearing, the court below excised all reference to the First Amendment, but did not change the rationale of its original decision. 556 F.2d 1281-82 (Pet. App. 47a). The Fifth Circuit has made an end run around *Hudgens* and declared First Amendment and Section 7 protections co-extensive.

> What is "a proper accommodation" in any situation may largely depend upon the content and the context of the § 7 rights being asserted. The task of the Board and the reviewing courts under the Act, therefore, stands in conspicuous contrast to the duty of a court in applying the standards of the First Amendment, which requires "above all else" that expression must not be restricted by government "because of its message, its ideas, its subject matter, or its content." 424 U.S. at 521.

In the instant case, the issue for accommodation consideration is the subject matter of the handout the Union sought to distribute. There was no need for the Union to distribute this handout. Unlike a situation involving matters directly affecting the employees' relationship with their employer, here the Union gratuitously decided to discuss political and general economic topics through its handout. Sections 2 and 3 of the handout were unnecessary intrusions on the employer's property rights.

As a proper accommodation depends upon the content and context of the Section 7 rights asserted, in this situation, where the subject matter of the distribution involved matters in the general economic and political sphere, at best tenuously connected to the employees' jobs or relations with the employer, the employer's property rights must prevail as a matter of law. To hold otherwise would render the balancing and accommodation process an empty gesture.

The "balancing" done by the court below does not follow this Court's mandate in *Hudgens, supra,* at 522. Nor does it represent "minimal interference" with the employer's property rights. It represents a total disregard of those property rights.

C. Alternative Channels Of Communication Were Available To The Union For Distribution.

It is germane to any balancing and accommodation process to examine not only the nature and strength of the Section 7 rights involved, if any, but also to consider whether there were alternative channels available for the effective communication of the union message. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105.

Here, the Union had always previously made use of the mails for distribution of its politically oriented messages (Pet. App. 13a, n.8). There is no dispute that Eastex had complied with every request by the Union for names and addresses of all employees (R. 47-48). There was no claim by the Union, nor evidence produced by the Board at the hearing, which indicated that it was not feasible for the Union to distribute its polemic outside the gates of the plant. The Union's only complaint was increased cost. Cf. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793. In short, no attempt was made to show that the ability of the Union to carry its political and economic message to the employees was truly diminished. *NLRB v. United Steelworkers*, 357 U.S. 357, 363.[10]

Where the nature of the activity sought to be engaged in by the Union is, at best, distant to any relationship between the employer and its employees, the existence of alternative means of communication weights the balance against distribution on the employer's private property.

10. This is not a situation where there was any anti-union animus (App. 10, R. 16-17). The Union has been the certified bargaining representative for Eastex employees since the opening of the plant in 1954 (R. 79). Nor does this case involve an organizing campaign, where the union might conceivably have a greater need to reach employees with its message. *Republic Aviation, supra.*

III. THE COURT BELOW UNDERTOOK AN ADMINISTRATIVE BALANCING PROPERLY A FUNCTION OF THE BOARD

The decision of the court below is also erroneous in its failure to recognize and require an administrative balancing of employee Section 7 rights and employer private property rights.[11] As noted in the denial of rehearing, "Eastex claims no balancing process was invoked in any of the administrative or judicial decisions in the case". In answering this charge, the Fifth Circuit asserted that "While *we* did not specifically cite *Hudgens*, *we* did recognize and necessarily applied the balancing test".[12] (Emphasis added) The Fifth Circuit made no attempt to address the omission of the administrative agency, and impliedly affirmed the failure of the Board to balance.

It is clear that the duty to balance and accommodate employees' Section 7 rights with the employer's property rights rests with the Board, not the courts. This Court in *Hudgens* recently reiterated this requirement. ". . . In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." 424 U.S. at 522. See also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169; *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443; *Securities and Exchange Commission v. Chenery Corp. (I)*, 318 U.S. 80, 90.

11. Of course, had the Board or the Fifth Circuit properly found the Union's activity to be "unprotected", no balancing process would have been necessary.

12. Pet. App. 45a. Eastex asserts that the Fifth Circuit failed to conduct a meaningful balancing process. See discussion, *supra.*

The Administrative Law Judge did not focus upon or make any reference to Eastex' property rights. He found only that the two disputed sections of the distributed material were protected by Section 7 and totally ignored Eastex' property rights. The Board adopted the opinion in its entirety, adding nothing. The Administrative Law Judge and the Board failed to "articulate any rational connection between the facts found and the choice made." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249. *Burlington Truck Lines, supra* at 168. *Metropolitan Life Ins. Co., supra* at 443.

Since no balancing process is evident in the administrative opinion, at the least the Court of Appeals should have remanded the case to the Board for further consideration of the issue of accommodation. *FTC v. Sperry & Hutchinson Co.; Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197. Instead, the court below asserted that it engaged in the original balancing process, thus superseding the function of the Board.[13]

The initial accommodation is the function of the Board. The duty of the Circuit Court is to review the determination of the Board, not to chart paths as yet untraveled by the Board. *Burlington Truck Lines, supra.*[14] Here, the Court of Appeals left the "narrow confines of law" and entered the "more spacious domain of policy" reserved for the Board. *Phelps Dodge Corp. v. NLRB*, 313

13. Decision on motion for rehearing, 556 F.2d at 1281 (Pet. App. 46a).

14. "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington*, 371 U.S. at 169. See also *Securities and Exchange Commission v. Chenery Corp. (II)*, 332 U.S. 194, 196.

U.S. 177, 194. See also, *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800; *NLRB v. Food Store Employees*, 417 U.S. 1, 9.

Even if this case is remanded, it is important for this Court to establish guidelines for the Board and reviewing court to apply in the balancing and accommodating process. The Board's position, and the decision of the court below, indicate clearly that there is a need for greater explication of the interaction between Section 7 rights and the private property rights of the employer.

The Board should be given direction as to factors to consider during the balancing and accommodation process. Its deliberation should include a consideration of whether there is a need for the activity; the closeness of the activity involved to the immediate employment relationship (nature and strength); the availability of alternative channels of communication; and the extent and duration of interference with the employer's property rights. Without consideration of these factors, among others, the balancing and accommodation process is incomplete.

CONCLUSION

For the above stated reasons, Eastex submits that the decision of the court below enforcing the Board's decision was erroneous and should be reversed.

Respectfully,

TOM MARTIN DAVIS
JOHN B. ABERCROMBIE
LAWRENCE J. MCNAMARA
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Attorneys for Petitioner

OF COUNSEL:

BAKER & BOTTS
One Shell Plaza
Houston, Texas 77002

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